



4191-02U

## SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404, 405, and 416

[Docket No. SSA-2012-0068]

RIN 0960-AH53

Submission of Evidence in Disability Claims

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: We are clarifying our regulations to require you to inform us about or submit all evidence known to you that relates to your disability claim, subject to two exceptions for certain privileged communications. This requirement includes the duty to submit all evidence that relates to your disability claim received from any source in its entirety, unless you previously submitted the same evidence to us or we instruct you otherwise. We are also requiring your representative to help you obtain the information or evidence that we require you to submit under our regulations. These modifications to our regulations will better describe your duty to submit all evidence that relates to your disability claim and enable us to have more complete case records on which to make more accurate disability determinations and decisions.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Janet Truhe, Office of Retirement and Disability Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235-6401, (410) 966-7203. For information on eligibility or filing for benefits, call our national toll-free number, 1-800-772-1213, or TTY 1-800-325-0778, or visit our Internet site, Social Security Online, at <http://www.socialsecurity.gov>.

#### SUPPLEMENTARY INFORMATION:

##### Background

We published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on February 20, 2014 (79 FR 9663). The preamble to the NPRM discussed the changes from our current rules and our reasons for proposing those changes.<sup>1</sup> In the NPRM, we proposed to clarify our regulations to require you to inform us about or submit all evidence known to you that relates to your disability claim, subject to two exceptions for certain privileged communications. We explained that this requirement would include the duty to submit all evidence from any source in its entirety, unless subject to one of these exceptions. We also proposed to require your representative to help you obtain the information or evidence that we would require you to submit under our regulations.

##### Public Comments

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<sup>1</sup> The NPRM is available at <http://www.gpo.gov/fdsys/pkg/FR-2014-02-20/pdf/2014-03426.pdf>.

We provided 60 days for the public to comment on the NPRM. We received 85 comments. The comments came from members of the public, advocacy groups, legal organizations, members of the disability advocacy community, and several national groups of Social Security claimants' representatives. After carefully considering the comments, we are adopting our proposed rule revisions, with the changes described below, in this final rule.

We provide summaries of the significant comments that were relevant to this rulemaking and our responses to those comments below. Some commenters supported the proposed changes. We appreciate those comments, but we have not summarized or responded to them because they do not require a response.

#### The Submission of Evidence That Relates to Disability Claims

Comment: Several commenters said our proposal in 20 CFR 404.1512(a) and 416.912(a) for claimants to submit evidence that “relates” to their disability claims is less clear than our current requirement to submit evidence that is “material” to the disability determination. Other commenters said the word “relates” is too vague and claimants will not know, for example, if they must inform us about medical treatment for a physical impairment when they have alleged disability based solely on a mental impairment. Several of these commenters said requiring claimants to submit information that “relates” to their disability claims would be an invasion of privacy, as it could include every matter about a claimant’s health history (for example, an abortion or HIV status). Other commenters said it would be difficult for claimants to know whether non-medical information, such as from social media or other types of proceedings (for

example, a worker's compensation claim), "relates" to their disability claims.

Response: We disagree with the commenters. Unless the context indicates otherwise, we generally intend for the words we use in our regulations to be construed according to their ordinary meaning. In final §§ 404.1512(a) and 416.912(a), we intend for the word "relates" to have its ordinary meaning, which is to show or establish a logical or causal connection between two things. Our current rules already incorporate this concept in the definition of evidence. Under our current rules, and under this final rule, we define evidence as "anything you or anyone else submits to us or that we obtain that relates to your claim." In our experience, neither claimants nor their representatives have had any difficulty determining whether something qualified as "evidence" under this definition.

Our current regulations, however, describe a claimant's duty to submit evidence in several ways and suggest that claimants must furnish medical and non-medical evidence that is "material" to the disability determination. The issue of what is "material" involves legal judgment. As we explained in the NPRM, by requiring claimants to submit all evidence that "relates" to their disability claims, we are removing the need to make that type of judgment.<sup>2</sup>

In addition, we expect claimants to exercise their reasonable, good faith judgment about what evidence "relates" to their disability claims keeping in mind, however, that the meaning of "relates" is broad and includes anything that has a logical or causal connection whether it is favorable or unfavorable to the claim. It is also important to note that we consider all of a

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<sup>2</sup> 79 FR at 9665.

claimant's impairments for which we have evidence, not just the ones alleged,<sup>3</sup> and we consider the combined effect of all impairments.<sup>4</sup> We are also required, subject to certain exceptions, to develop a complete medical history for at least the 12 months preceding the date of the disability application.<sup>5</sup> Therefore, evidence of treatment for conditions other than the one alleged by the claimant could relate to the disability claim. For example, if a claimant alleged a back impairment, the treatment records from health care providers other than the treating orthopedic surgeon (for example, from a family doctor who has rendered treatment for a condition other than the one alleged) may contain related information. Therefore, we may ask the claimant if he or she saw other providers during the period at issue. In addition, if the back impairment arose out of an injury at work, we would expect the claimant, upon our request, to inform us whether he or she filed a worker's compensation claim. If so, we may obtain the records from that claim, because they may contain evidence that "relates" to the claim for disability.

However, we would expect our adjudicators to exercise their reasonable, good faith judgment when requesting information or evidence from claimants. For example, we would not require a claimant to disclose treatment for a health matter such as an abortion, if the claimant alleged disability based on a genetic disorder.

Comment: Several commenters recommended that we not revise our regulations regarding the submission of evidence, because they believed our current rules work well. Several of these commenters said claimants already have a duty to inform us about all medical treatment received and submit evidence that is "material" to the disability determination. Some

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<sup>3</sup> See 20 CFR 404.1512(a) and 416.912(a); see also 42 U.S.C. 423(d)(2)(B) and 1382c(a)(3)(G).

<sup>4</sup> See 20 CFR 404.1523 and 416.923.

<sup>5</sup> See 20 CFR 404.1512(d) and 416.912(d).

of these commenters also said no change was necessary regarding the submission of evidence by representatives, because attorneys have an ethical duty not to withhold evidence. Some of these commenters said our current “Rules of conduct and standards of responsibility for representatives,” which apply to attorney and non-attorney representatives,<sup>6</sup> are sufficient to ensure the submission of complete evidence on behalf of claimants. One of these commenters recommended that we impose harsher penalties on representatives who withhold evidence that is unfavorable to the disability claim.

Response: We did not adopt the comments. As we explained in the NPRM, our current regulations describe a claimant’s duty to submit medical and non-medical evidence in several ways, and they could be clearer about the duty to submit all evidence (both favorable and unfavorable) that relates to the disability claim.<sup>7</sup> Similarly, our current regulations governing the conduct of representatives describe their related duty to submit evidence in several ways; those regulations could also be clearer.<sup>8</sup> We provide that greater clarity in this final rule. The need for greater clarification also implicates program integrity because, as we explained in the NPRM, we know that we do not always receive complete evidence from claimants or their representatives.<sup>9</sup> Clarifying our rules regarding the duty to submit all evidence that relates to the disability claim will “enable us to obtain more complete case records and adjudicate claims more accurately.”<sup>10</sup>

In addition, as we previously stated, our current regulations suggest that claimants and their representatives must make legal judgments about what is “material” to the disability claim.

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<sup>6</sup> See 20 CFR 404.1740 and 416.1540.

<sup>7</sup> 79 FR at 9664.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id. at 9665.

Our final rule removes the need to make that type of legal judgment.

Comment: Several commenters questioned how claimants would inform us about all evidence that “relates” to their disability claims and asked whether they will have to volunteer this information or simply respond to our specific requests. Some of these commenters said it would be burdensome and unrealistic to require claimants, particularly those who are unrepresented, homeless, or who have mental impairments, to disclose on a voluntary basis every disability-related statement or activity. Other commenters asked whether claimants should memorialize, and then submit to us, all of the disability-related statements they made to others (for example, to doctors, friends, or family members). One of the commenters asked whether the duty to submit all evidence would require claimants to disclose the names of all people with personal knowledge of the claim. Another commenter asked whether claimants would have a duty to supplement information they previously submitted, if they later become aware of additional responsive information. Another commenter asked if claimants would have to disclose the existence of evidence, which they were unaware of at the time of our initial request, but that they became aware of later. One commenter asked whether the duty to submit all evidence would apply at the Appeals Council level.

Response: We use a standardized process for obtaining information and evidence from claimants about their disability claims. For example, in the adult disability application process, we ask a variety of questions about the claimant’s medical condition, work activity, job history, and medical treatment.<sup>11</sup> Under final §§ 404.1512(a) and 416.912(a), we expect claimants to

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<sup>11</sup> See Form SSA-3368-BK, Disability Report – Adult (available at <http://www.socialsecurity.gov/forms/ssa-3368.pdf>).

comply with their duty to submit evidence by providing all information known to them that relates to these requests. We may also make other types of requests for information and evidence that we would expect claimants to provide.<sup>12</sup>

Aside from responding fully to our specific requests, claimants also submit other evidence to us. Claimants do not have to memorialize statements made to others or disclose the names of all people with personal knowledge of their claims, unless they would like us to consider that information. Final §§ 404.1512(c) and 416.912(c) require only that claimants submit all evidence “received” from another source in its entirety.

For claimants who need assistance in responding to our requests for information and evidence, we currently provide that assistance. For example, when a claimant submits a disability application, we ask the claimant to provide the name of someone we can contact who knows about the claimant’s medical condition and can help the claimant with his or her disability claim. We also provide special procedures for obtaining evidence from homeless claimants<sup>13</sup> and instruct our adjudicators on how to assist claimants with mental impairments when requesting information or evidence from them.<sup>14</sup>

The duty to inform us about or submit all evidence that relates to the disability claim is ongoing, and we have modified proposed (now final) §§ 404.1512(a) and 416.912(a) to clarify

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<sup>12</sup> For example, in some cases, we may want to obtain evidence about a claimant’s ability to function and perform activities of daily living, and we will ask him or her to complete Form SSA-3373-BK, Function Report – Adult. We would expect the claimant to provide all information known to him or her that relates to the requests on this form.

<sup>13</sup> See Program Operations Manual System (POMS) DI 11005.004 (available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0411005004>).

<sup>14</sup> For example, when obtaining evidence from a claimant with a mental impairment, our adjudicators should consider any request for accommodation, such as giving additional time to comply. See POMS DI 23007.005 (available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0423007005>).



that claimants must disclose any additional evidence related to their disability claims about which they become aware. Therefore, after we have made a request for a particular type of information or evidence, claimants must supplement their previous response, if they become aware of additional related evidence. Claimants must also disclose the existence of evidence that they were unaware of at the time of our initial request, but become aware of later on. This ongoing duty applies at each level of the administrative review process, including the Appeals Council level if relates to the period which is the subject of the most recent hearing decision.

Comment: Several commenters recommended that we only require claimants to submit evidence in specific categories (for example, medical records), which was one of several options suggested by the Administrative Conference of the United States (ACUS) in its Final Report.<sup>15</sup> These commenters said this requirement would be preferable to the more general requirement we proposed in §§ 404.1512(a) and 416.912(a) (for the submission of all evidence that “relates” to the disability claim), because it would minimize the need for claimants or their representatives to make legal judgments about whether evidence is “material” or “relevant.” One of these commenters also said it would be difficult for claimants to know what constitutes related unfavorable evidence.

Response: We did not adopt these comments. We considered ACUS’s suggestion that we identify a particular category of documents that a claimant must identify or produce with some reasonable degree of certainty, but we decided that it was not practical for several reasons.

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<sup>15</sup> Administrative Conference of the United States, *SSA Disability Benefits Programs: The Duty of Candor and Submission of All Evidence*, at 40 (Oct. 15, 2012) (“ACUS Final Report”), *available at* [http://www.acus.gov/sites/default/files/documents/ACUS\\_Final\\_Report\\_SSA\\_Duty\\_of\\_Candor.pdf](http://www.acus.gov/sites/default/files/documents/ACUS_Final_Report_SSA_Duty_of_Candor.pdf).

First, there is a wide variety of evidence that could relate to a disability claim, and it is difficult to specify all of the potential categories in a regulation (aside from medical records, which we need to determine disability in all cases). Second, as we previously stated, we removed the need for claimants to make any legal judgments about what evidence they should submit. By requiring the submission of all evidence that “relates” to the disability claim in final §§ 404.1512(a) and 416.912(a), claimants will only have to inform us about or submit evidence that has a logical or causal connection with their disability claims; such evidence will necessarily include both favorable and potentially unfavorable evidence. Thus, there will be no need for claimants to determine what constitutes “unfavorable” evidence.

Comment: Several commenters said we should not require claimants to submit evidence that relates to their disability claims if it is unfavorable. For example, some of these commenters said unfavorable evidence could be inaccurate or unreliable, or it could come from doctors who are biased against claimants or are not knowledgeable about certain impairments. Another commenter said the requirement to submit all evidence that relates to the disability claim would preclude representatives from exercising their professional judgment about what evidence they should submit in support of their clients’ disability claims. One commenter expressed concern that the requirement could mean claimants would have to submit statements by those who have a personal grudge (for example, a former spouse). Another commenter believed the requirement to submit unfavorable evidence might deter claimants from seeking medical evaluations that could lead to helpful treatment out of fear they might have to disclose this information later in a disability claim.

Response: We disagree with the commenters. We proposed to require claimants to submit all evidence (favorable or unfavorable) that relates to their disability claims because we believe a more complete record will give us a fuller picture of the extent of a claimant's impairments and the limitations they impose. As a result, we expect that the changes we are making in this final rule will enable us to make more accurate disability determinations and decisions, consistent with Congress's intent and our responsibility to ensure the proper stewardship of the disability program. Allowing claimants (or their representatives) to inform us about or submit only the evidence that they would like us to consider would undermine that goal. It would also be inconsistent with Congress's intent in enacting section 201 of the Social Security Protection Act of 2004 (SSPA),<sup>16</sup> which authorizes us to impose a civil monetary penalty on a claimant who should have come forward to notify us of changed circumstances that affect eligibility, but failed to do so. As we previously stated, we expect our adjudicators to exercise their reasonable, good faith judgment when requesting evidence from claimants that relates to the disability claim. Therefore, we do not believe claimants or their representatives will have to respond to requests for information or evidence that are burdensome or pertain to unrelated matters.

In addition, it is fair to require the disclosure of related but potentially unfavorable evidence, because claimants (or their representatives) can explain to us why they believe we should give such evidence little or no weight. Claimants and their representatives routinely make arguments for and against certain evidence in other types of cases, and they can also make these arguments in disability cases. Moreover, we do not base our determinations or decisions

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<sup>16</sup> 42 U.S.C. 1320a-8.

on only one piece of evidence when we adjudicate a claim. Rather, our adjudicators must base their determinations and decisions on the preponderance of the evidence.<sup>17</sup> Because we base our determinations or decisions on a preponderance of the evidence, we do not believe the commenter's concern that unfavorable evidence could be inaccurate or unreliable, or could come from a medical source who is biased or not knowledgeable about certain impairments, requires us to make any revisions to the final rule. In addition, we disagree with one commenter's suggestion that the duty to submit potentially unfavorable evidence might deter people from seeking medical evaluations and treatment out of fear they might have to disclose this evidence in a future disability claim. We believe that view is speculative and contrary to how people behave, which is to act in their best interests by seeking medical treatment when needed.

Comment: Several commenters said our proposal to require the submission of all evidence that relates to the disability claim makes the determination process more formal and adversarial. Some of these commenters believed this requirement would be inconsistent with our duty to gather evidence regarding the claim. One of these commenters said that providing claimants with the protections of attorney-client privilege and the attorney work product doctrine was inconsistent with the informal and non-adversarial nature of our current disability determination process.

Response: We disagree with the commenters. In fact, the non-adversarial nature of our disability determination process is what requires us to ensure a high level of cooperation from claimants. Moreover, we did not propose any change to how we determine disability at any level of the administrative review process. In the NPRM, we stated that our disability system is “non-

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<sup>17</sup> See 20 CFR 404.902 and 416.1402.

adversarial,” and we reaffirmed our duty to “assist claimants in developing the medical and non-medical evidence we need to determine whether or not they are disabled.”<sup>18</sup> The requirement for claimants to inform us about or submit all evidence that relates to the disability claim does not change the process for how we determine disability. Rather, as we have stated repeatedly, this requirement will simply enable us to make more accurate disability determinations, because we will have more complete case records on which to make those determinations.

Comment: Several commenters expressed concern about claimants who conceal evidence from their representatives, either intentionally or by mistake, and asked whether we would penalize the representative in these situations. Some of the commenters also expressed concern about unrepresented claimants who mistakenly withhold evidence from us that we believe relates to the disability claim. These commenters believed it would be unfair for us to penalize these claimants, especially if their mistakes were due to a cognitive difficulty.

Response: As we previously stated, under our final rule, we expect claimants to exercise their reasonable, good faith judgment about what evidence “relates” to their disability claims consistent, of course, with the meaning of the term “relates,” which could include unfavorable evidence. Our final rule does not broaden or otherwise alter the Commissioner’s statutory authority to impose a civil monetary penalty under the SSPA.<sup>19</sup> The standard for imposing a civil monetary penalty under the SSPA requires the Commissioner to find that a person withheld “disclosure of, a fact which the person knows or should know is material to the determination of

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<sup>18</sup> 79 FR at 9665.

<sup>19</sup> Social Security Protection Act of 2004, section 201, 42 U.S.C. 1320a-8.

any initial or continuing right to . . . [benefits or payments].”<sup>20</sup> The Commissioner must also find that the person “knows, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading.”<sup>21</sup> Given the standard set forth in the SSPA, we do not expect that a claimant who mistakenly withholds evidence due to a cognitive deficit would be subject to a civil monetary penalty. We also do not expect that a representative would be subject to a civil monetary penalty under the SSPA if the representative’s client concealed evidence from him or her. It is also important to note, as we previously stated, that we assist any claimant who requests help in responding to our requests for information or evidence, and we have special procedures when requesting information or evidence from homeless claimants and those with mental impairments.

Comment: Several commenters suggested that rather than revise our regulations regarding the submission of evidence by claimants and their representatives, we should instead do more to obtain the evidence we need to decide disability claims. For example, one of these commenters recommended that we assign a government representative to work with claimants (or their representatives) to ensure the development of needed evidence. Another commenter suggested that we consider expanding our own obligation to assist claimants in obtaining medical records.

Response: We did not adopt the comments, some of which are outside the scope of this rulemaking proceeding. As we explained in the NPRM, under our current regulations, we assist claimants in developing the medical and non-medical evidence we need to determine disability

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<sup>20</sup> Id. section 201, 42 U.S.C. 1320a-8(a)(1).

<sup>21</sup> Id.

throughout the administrative review process.<sup>22</sup> Representatives (attorney and non-attorney) also assist claimants in submitting evidence and in complying with our requests for evidence.<sup>23</sup>

Therefore, we do not believe it is necessary to assign an additional government representative to assist claimants or their representatives in the evidence collection process. In any event, such a suggestion is outside the scope of this rulemaking proceeding.

In addition, we are always striving to find better methods of obtaining medical and other evidence we need to decide disability claims. For example, use of health information technology (HIT) enables us to access and organize a person's complete medical records upon receipt of a claim. We continue to expand our use of HIT and explore ways of improving the medical and non-medical evidence collection process.

Comment: Several commenters expressed concern about our removal of the term "relevant" in proposed §§ 404.1512(b)(1)(iii) and 416.912(b)(1)(iii). Sections 404.1512(b)(3) and 416.912(b)(3) currently refer to evidence of disability-related statements made by the claimant or others "or any other relevant statements" made by the claimant "to medical sources during the course of examination or treatment, or to us during interviews, on applications, in letters, and in testimony in our administrative proceedings." Without the term "relevant," the commenters asked whether there would be any limit on the scope of these "other statements," which we require claimants to disclose under this final rule.

Response: We removed the term "relevant" in proposed (now final) §§

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<sup>22</sup> 79 FR at 9665. See 20 CFR 404.1512(d) and (e), 416.912(d) and (e).

<sup>23</sup> See 20 CFR 404.1740(b)(1) and (2) and 416.1540(b)(1) and (2).

404.1512(b)(1)(iii) and 416.912(b)(1)(iii) to avoid confusion with the standard for submission of evidence in this final rule, which is the submission of all evidence that “relates” to the disability claim. These sections must still be read, however, in conjunction with final §§ 404.1512(b) and 416.912(b), where we define the term “evidence” as “anything you or anyone else submits to us or that we obtain that relates to your claim.” (Emphasis added). All of the categories of “evidence” that we go on to define in these sections, such as the “other statements” referred to in final §§ 404.1512(b)(1)(iii) and 416.912(b)(1)(iii), are, therefore, limited in scope to those that relate to the disability claim.

#### The Privilege and Work Product Exceptions

Comment: Two commenters expressed concern about our extension of the protections afforded by attorney-client privilege and the attorney work product doctrine in proposed §§ 404.1512(b)(2)(iii) and 416.912(b)(2)(iii) to non-attorney representatives. One of these commenters said non-attorney representatives have no experience or knowledge of what these privileges protect; therefore, the claimants they represent may not have the same protections as claimants who are represented by attorneys. The other commenter said it was not practical or reasonable to require non-attorneys to make legal judgments about what communications would be subject to these privileges. This commenter also said that extension of these privileges to non-attorney representatives would cause confusion and uncertainty, resulting in detriment to claimants.

Response: We disagree with the commenters for several reasons. First, we defined both



types of privileges in plain language and gave examples of what would and would not be covered by each privilege in the NPRM and in this final rule.<sup>24</sup> Second, our current “Rules of conduct and standards of responsibility” apply to all representatives,<sup>25</sup> and we do not believe there is any basis to distinguish between attorney and non-attorney representatives regarding their duty to help obtain the evidence that claimants must submit. We would disadvantage certain claimants if we did not apply the protections afforded by these privileges to non-attorney representatives. For example, claimants who are represented by non-attorney representatives would have to disclose information that a claimant represented by an attorney representative would not be required to disclose. Finally, as recommended by ACUS, we believe that any changes to our evidence regulations should apply to both attorney and non-attorney representatives because, under the Social Security Act and our rules, a claimant has the right to be represented by either an attorney or a qualified non-attorney representative.<sup>26</sup>

Comment: Several commenters said the requirement for attorney representatives to assist claimants in submitting related but unfavorable evidence would violate their state bar ethics rules requiring the preservation of client confidentiality and zealous representation. One of these commenters said this requirement would also violate state bar rules because it would require the submission of attorney work product. Some of the commenters expressed concern about situations where claimants direct their attorneys to withhold unfavorable evidence, which may leave the attorneys with having to choose between following their clients’ instructions and complying with a representative’s duty to help the claimant obtain the information or evidence that he or she must submit under the final rule.

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<sup>24</sup> 79 FR at 9665-66.

<sup>25</sup> See 20 CFR 404.1740 and 416.1540.

<sup>26</sup> ACUS Final Report at 38.

Response: We disagree with the commenters. In proposed (now final) §§ 404.1512(b)(2)(i) and 416.912(b)(2)(i), we exclude from the definition of evidence oral and written communications between claimants and their representatives (attorney or non-attorney) that are, or would be, subject to the attorney-client privilege, unless the claimant voluntarily discloses them to us. In proposed (now final) §§ 404.1512(b)(2)(ii) and 416.912(b)(2)(ii), we also exclude from the definition of evidence the information that is generally subject to the attorney work product doctrine.<sup>27</sup> We drafted the requirement for claimants to inform us about or submit all evidence that relates to the disability claim with the attorney client and attorney work product privileges in mind, and believe that the final rule does not require an attorney to violate his or her ethical duty to keep client communications confidential<sup>28</sup> or require the submission of attorney work product.

In addition, while we acknowledge that state bar rules generally require client confidentiality and zealous representation, we do not believe state bar rules prevent an attorney from complying with our Federal rule, which requires a representative to help a claimant satisfy his or her disclosure obligation. As ACUS noted, the American Bar Association's (ABA) Model Rules of Professional Conduct permit attorneys to disclose otherwise confidential information if "other law" or a "court order" requires the disclosure.<sup>29</sup> These rules would constitute such "other law." In addition, as one leading legal scholar in this area has noted, "none of the opinions" that

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<sup>27</sup> As we explained in the NPRM, this doctrine protects an attorney's analysis, theories, mental impressions, and notes from disclosure. 79 FR at 9666 (footnote omitted).

<sup>28</sup> As we noted in the NPRM, however, the attorney-client privilege does not protect the disclosure of underlying facts that the claimant communicates to the attorney; it protects only the disclosure of the communication, itself. *Id.* at 9665.

<sup>29</sup> ACUS Final Report at 33-34 (citing the ABA's Model Rules of Professional Conduct section 1.6(b)(6) (2012)).

various State bars have issued on a representative's duty to submit adverse evidence in connection with a disability claim "suggests that an attorney may violate federal law because of a state bar ethics rule."<sup>30</sup> Moreover, "Even if a state's bar rules did not contain provisions similar to Model Rules 1.6(b)(6) or 8.5(b), the notion that an attorney could be punished by his or her state bar for complying with federal law in a federal forum is antithetical to the Supremacy Clause" of the Constitution and the Supreme Court's decision in Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379 (1963).<sup>31</sup> In short, "there is no merit to the argument that an SSA rule mandating that an attorney disclose adverse evidence would subject an attorney to sanctions by his or her state bar."<sup>32</sup>

Furthermore, we are unaware of any other forum that permits attorneys to withhold unfavorable evidence, if it relates to an issue in the case. Under this final rule, we expect all representatives (attorney or non-attorney) to inform the claimants they represent that we do not permit the withholding of any evidence related to the disability claim, even if it is unfavorable. Accordingly, in the situation described by several commenters where the claimant directs the representative to withhold unfavorable evidence, that communication is privileged, but the evidence would still have to be produced.

Comment: One commenter recommended that we extend the protections afforded by attorney-client privilege to non-authorized representatives, such as physicians, licensed clinical social workers, and other licensed health care providers. The commenter noted that many of

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<sup>30</sup> See Robert Rains, Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance with Federal Rules on Production of Adverse Evidence, 92 Cornell L. Rev. 363, 390 (2007).

<sup>31</sup> Id. at 392.

<sup>32</sup> Id.

these professionals engage in privileged communications with their patients, and they sometimes assist patients with their disability claims. Therefore, the commenter said we should also regard these communications as privileged.

Response: We did not adopt the comment. When claimants apply for disability benefits, they sign an authorization form that permits all medical and certain other sources to disclose all medical records and other information related to the claimant's ability to perform tasks.<sup>33</sup> Therefore, claimants cannot keep these otherwise privileged communications about their physical or mental condition(s) private.

Comment: One commenter believed that our exception for privileged communications between claimants and their representatives, unless voluntarily disclosed by the claimant, would permit us to communicate directly and impermissibly with claimants instead of their representatives.

Response: We disagree with the commenter. In final §§ 404.1512(b)(2)(i) and 416.912(b)(2)(i), we exclude from the definition of "evidence,"<sup>34</sup> oral and written communications between claimants and their representatives, unless the claimant voluntarily discloses them to us. The attorney-client privilege belongs to the client, and only the client can waive this privilege. The exception for voluntary disclosure of otherwise privileged communications in final §§ 404.1512(b)(2)(i) and 416.912(b)(2)(i) is in recognition of this legal principle; it does not mean we intend to communicate directly with claimants who have

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<sup>33</sup> See Form SSA-827, Authorization to Disclose Information to the Social Security Administration.

<sup>34</sup> We describe what we mean by "evidence" in final 20 CFR 404.1512(b)(1) and 416.912(b)(1).

representatives assisting them with their disability claims.<sup>35</sup>

Comment: Several commenters asked why we proposed a more limited version of the work product doctrine in §§ 404.1512(b)(2)(ii) and 416.912(b)(2)(ii) than is recognized under Rule 26(b) of the Federal Rules of Civil Procedure. Several of these commenters said a more limited version of the work product doctrine would deter representatives from having candid discussions with a claimant's medical sources, due to the potential of having to disclose an unfavorable or inaccurate written report. Some commenters said that representatives would have to disclose written opinions received from medical experts, even if the expert was not going to testify. The commenters recommended we adopt the full scope of the work product doctrine, so representatives could withhold this type of evidence.

Response: We did not adopt the comments. We proposed a more limited version of the work product doctrine because we believe program integrity requires us to obtain complete medical evidence (favorable or unfavorable) in disability claims. Therefore, we expressly stated in proposed (now final) §§ 404.1512(b)(2)(ii) and 416.912(b)(2)(ii) that representatives could not withhold any medical evidence or medical source opinions based on the attorney work product doctrine. As we explained in the NPRM, if a claimant's medical source sends his or her representative medical records or a written opinion about the claimant's medical condition, the representative cannot withhold those records or that opinion based on the work product doctrine

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<sup>35</sup> Under our policy, if a claimant appoints a representative, we make all contacts in connection with that claim or a post-entitlement issue through, or with the permission of, the appointed representative. This policy is subject to exceptions when the representative asks us to deal directly with the claimant, the claimant alleges blindness or a visual impairment and elects to receive notices by first class mail with a follow-up telephone call from us to read the notices, there is an indication that a representative's appointment may have expired, or the contact involves a possible violation by the representative. See POMS GN 03910.050A (available at: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0203910050>).

adopted under these rules.<sup>36</sup> If those records or that opinion contains an inaccuracy or unfavorable information, then claimants or their representatives can explain this to us.

In addition, representatives may still protect from disclosure their consultation with any medical source about the claimant's medical condition. As we stated previously, if a representative takes notes during a discussion with a claimant's medical source, those notes are protected from disclosure as work product. Moreover, under the final rule, the representative does not have to request a written opinion from any medical source. Therefore, representatives can fully investigate the merits of any disability claim, and they do not have to disclose the results of their investigation, unless they obtain a medical record or a written opinion from a medical source.

#### The Submission of Evidence in its Entirety

Comment: Many commenters asked whether our proposal in §§ 404.1512(c) and 416.912(c) to require the submission of evidence from a source in its entirety would create a duty on the part of claimants (or their representatives) to request and submit all medical records from all treating sources. Several commenters asked whether claimants (or their representatives) should request all records from a treating source or only those dated after the onset of disability. Some of the commenters noted that medical records could be costly and difficult for some claimants to obtain. One of these commenters said treating sources do not always send all the records requested, and another commenter noted that sometimes a doctor sends records for someone other than the claimant by mistake. Another commenter described the example of a

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<sup>36</sup> 79 FR at 9666.

hospital file numbering 1000 pages or more and asked whether a representative could simply request and submit the discharge summary. Other commenters asked whether we would still be requesting and paying for medical records from sources identified by claimants. One commenter asked whether claimants would now have to obtain and submit not only all medical evidence, but also all non-medical evidence that relates to the disability claim. Another commenter recommended that we lower the burden on claimants to submit all related non-medical evidence, because its evidentiary value is less than that of medical evidence. Another commenter suggested we require claimants to submit only medical evidence in its entirety.

Response: We are modifying proposed (now final) §§ 404.1512(c) and 416.912(c) to clarify that claimants must submit evidence “received” from another source in its entirety. We did not intend in these sections to impose a duty on claimants or their representatives to request and submit all evidence (medical and non-medical) from all sources, and we believe this clarification makes that intent more clear. For example, if claimants or their representatives request only the discharge summary from a hospital chart, we require them to submit only what they receive in response to that request in its entirety. We would not require them to request and pay for all of the other records from that hospitalization. We would also not require them to submit any record for a person other than the claimant, sent by mistake, because it clearly would not relate to the disability claim.

Moreover, as we proposed in §§ 404.1512(a) and 416.912(a) and explained in the NPRM, by requiring claimants “to inform us about or submit” all evidence that relates to the disability

claim, we are not shifting our responsibility for developing the record to claimants<sup>37</sup> or their representatives.<sup>38</sup> For example, we currently request the names and addresses of medical sources in our disability application process.<sup>39</sup> Under the final rule, we expect claimants to respond fully by providing that information; we will then obtain the records from those sources. As we previously stated, we also expect claimants to respond fully to any other requests we make for information or evidence related to their disability claims.

Comment: Many commenters expressed concern about our requirement for claimants to submit evidence from another source in its entirety, because it would require the submission of potentially duplicative evidence. One of these commenters described the example of when a representative submits medical records from a treating source and then requests updated records; the source sends everything he or she has already provided, plus the updated records. Another commenter noted that our adjudicators sometimes instruct claimants (or their representatives) not to submit duplicative records. The commenters recommended we not require the submission of evidence that is already in the claim file, because that evidence can be costly for claimants to resubmit and time-consuming for our adjudicators to review. To avoid duplicative evidence, one commenter recommended that we not require claimants to submit any evidence previously submitted by them. Other commenters recommended that we simply not require the submission of any duplicative evidence.

Response: We partially adopted the comments by clarifying in final §§ 404.1512(c) and

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<sup>37</sup> Id. at 9665 (emphasis added).

<sup>38</sup> Id. at 9666.

<sup>39</sup> These are the Form SSA-3368-BK, Disability Report – Adult (available at: <http://www.socialsecurity.gov/forms/ssa-3368.pdf>), and the Form SSA-3820-BK, Disability Report – Child (available at: <http://www.socialsecurity.gov/forms/ssa-3820.pdf>).



416.912(c) that evidence from another source must be submitted in its entirety “unless you previously submitted the same evidence to us or we instruct you otherwise.”

For example, in the scenario described above about the receipt of duplicative medical records from a treating source, the representative is only required to submit the updated records; he or she would not have to submit any record duplicative of the one previously submitted. In addition, by “duplicative,” we mean an exact duplicate of a document in the record, and not simply the substance of what is in the record.

The other exception we provide in final §§ 404.1512(c) and 416.912(c) is for when one of our adjudicators directs claimants or their representatives not to submit duplicative evidence; in that case, they would not have to submit that evidence under the final rule. We do not believe it is advisable to preclude the submission of all duplicative evidence, however, because this would impose a duty on claimants to review their files before submitting new evidence. For claimants who do not have representatives, this could be a significant burden in some cases. Not requiring claimants (or their representatives) to resubmit the same evidence they previously submitted is, however, reasonable. We believe the two limited exceptions for duplicative evidence specified in final §§ 404.1512(c) and 416.912(c) will underscore the importance of submitting evidence received from another source in its entirety and better ensure our goal of having more complete case records on which to make more accurate disability determinations and decisions.

Comment: One commenter believed the proposed revisions to our regulations governing

the submission of evidence would require claimants to get representatives.

Response: We disagree with the commenter. We did not propose any change to our regulations that would require claimants to get representatives. In addition, by stating that the claimant's duty to submit evidence now includes the option to simply "inform us about" evidence that relates to the disability claim,<sup>40</sup> we believe it will be easier for claimants to comply with their duty to submit evidence. Our responsibility to assist claimants in developing the record also remains unchanged.

Comment: Many commenters said our requirement in proposed §§ 404.1512(c) and 416.912(c) for claimants to submit evidence from another source in its entirety would burden our adjudicators with an excessive amount of potentially irrelevant evidence. Several of these commenters noted, for example, that medical records from some sources (such as the Department of Veterans Affairs) can be voluminous, and the time spent reviewing those records would cause delays in the adjudication of disability claims. Several of these commenters said a provider's medical records could include evidence that is unrelated to the disability claim. Other commenters expressed concern about whether our adjudicators would carefully review voluminous records submitted by claimants (or their representatives). Several commenters said it would be preferable for claimants or their representatives to exercise their own judgment and submit only those records or other evidence that they think is relevant.

Response: We disagree with the commenters. We do not believe the requirement to submit all evidence received from another source in its entirety will burden our adjudicators with

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<sup>40</sup> See final 20 CFR 404.1512(a) and 416.912(a).

having to review unnecessary evidence in most cases. First, as we previously stated, we did not intend in proposed (now final) §§ 404.1512(c) and 416.912(c) to require claimants (or their representatives) to request and submit all medical and non-medical evidence from all sources, and we modified these sections to clarify that claimants must only submit evidence “received” from another source in its entirety. We did not adopt the comments recommending that we permit claimants or their representatives to decide what evidence they would like to submit from these other sources, because this would undermine the purpose of the final rule, which is to enable us to have more complete records on which to adjudicate claims more accurately.

Second, as we previously stated, we modified proposed (now final) §§ 404.1512(c) and 416.912(c) to require the submission of evidence received from another source in its entirety, unless previously submitted by the claimant or otherwise instructed by us in a particular case. We believe these exceptions to the general requirement for submission of evidence in its entirety will reduce the receipt of duplicative and, therefore, unnecessary evidence.

Finally, we do not share the concerns of the commenters who said the submission of voluminous documents by claimants or their representatives would burden our adjudicators and delay the adjudication of disability claims. For example, when a claimant has had extensive medical treatment, it is already our practice to request complete medical records, unless we can decide the claim based on minimal objective medical evidence, as in the case of a compassionate allowance.<sup>41</sup> Our program experience shows that our adjudicators have little difficulty reviewing medical and other evidence expeditiously to find the information they need to decide the claim. We also continue to expand our use of HIT, which enables us to speed our review of medical

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<sup>41</sup> For more information about compassionate allowances, see [www.socialsecurity.gov/compassionateallowances](http://www.socialsecurity.gov/compassionateallowances).

records, even when they are voluminous. We intend to take full advantage of this technology as it becomes more widespread in the medical community.

## Regulatory Procedures

### Executive Order 12866, as supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that this final rule meets the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Therefore, OMB reviewed it.

### Regulatory Flexibility Act

We certify that this final rule would not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

### Paperwork Reduction Act

These rules do not create any new or affect any existing collections and, therefore, do not require Office of Management and Budget approval under the Paperwork Reduction Act.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security – Disability Insurance; 96.002, Social Security – Retirement Insurance; and 96.004, Social

Security – Survivors Insurance)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 405

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Public assistance programs, Reporting and recordkeeping requirements, Social Security, Supplemental Security Income (SSI).

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

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Carolyn W. Colvin,  
Acting Commissioner of Social Security.

For the reasons stated in the preamble, we amend subparts J, P, and R of part 404, subparts A and D of part 405, and subparts I, N, and O of part 416 as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950- )

Subpart J—[Amended]

1. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 204(f), 205(a)-(b), (d)-(h), and (j), 221, 223(i), 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a)-(b), (d)-(h), and (j), 421, 423(i), 425, and 902(a)(5)); sec. 5, Pub. L. 97-455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)-(e), and 15, Pub. L. 98-460, 98 Stat. 1802 (42 U.S.C. 421 note); sec. 202, Pub. L. 108-203, 118 Stat. 509 (42 U.S.C. 902 note).

2. Amend § 404.900 by revising paragraph (b) to read as follows:

§ 404.900 Introduction.

\* \* \* \* \*

(b) Nature of the administrative review process. In making a determination or decision in your case, we conduct the administrative review process in an informal, non-adversarial manner.

Subject to the limitations on Appeals Council consideration of additional evidence (see §§ 404.970(b) and 404.976(b)), we will consider at each step of the review process any information you present as well as all the information in our records. You may present the information yourself or have someone represent you, including an attorney. If you are dissatisfied with our decision in the review process, but do not take the next step within the stated time period, you will lose your right to further administrative review and your right to judicial review, unless you can show us that there was good cause for your failure to make a timely request for review.

3. Revise § 404.935 to read as follows:

§ 404.935 Submitting evidence prior to a hearing before an administrative law judge.

You should submit information or evidence as required by § 404.1512 or any summary of the evidence to the administrative law judge with the request for hearing or within 10 days after filing the request, if possible. Each party shall make every effort to ensure that the administrative law judge receives all of the evidence (see § 404.1512) or all of the evidence is available at the time and place set for the hearing.

Subpart P—[Amended]

4. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a)-(b) and (d)-(h), 216(i), 221(a), (i), and (j), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a)-(b) and (d)-(h), 416(i), 421(a), (i), and (j), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104-193, 110 Stat. 2105, 2189; sec. 202, Pub. L. 108-203, 118 Stat. 509 (42 U.S.C. 902 note).

5. In § 404.1512, revise paragraphs (a) through (c) to read as follows:

§ 404.1512 Evidence.

(a) General. In general, you have to prove to us that you are blind or disabled. You must inform us about or submit all evidence known to you that relates to whether or not you are blind or disabled. This duty is ongoing and requires you to disclose any additional related evidence about which you become aware. This duty applies at each level of the administrative review process, including the Appeals Council level if the evidence relates to the period on or before the date of the administrative law judge hearing decision. We will consider only impairment(s) you say you have or about which we receive evidence.

(b) What we mean by “evidence.” Evidence is anything you or anyone else submits to us or that we obtain that relates to your claim.

(1) Evidence includes, but is not limited to:

(i) Objective medical evidence, that is, medical signs and laboratory findings as defined in § 404.1528(b) and (c);

(ii) Other evidence from medical sources, such as medical history, opinions, and statements about treatment you have received;



(iii) Statements you or others make about your impairment(s), your restrictions, your daily activities, your efforts to work, or any other statements you make to medical sources during the course of examination or treatment, or to us during interviews, on applications, in letters, and in testimony in our administrative proceedings;

(iv) Information from other sources, as described in § 404.1513(d);

(v) Decisions by any governmental or nongovernmental agency about whether or not you are disabled or blind (see § 404.1504);

(vi) At the initial level of the administrative review process, when a State agency disability examiner makes the initial determination alone (see § 404.1615(c)(3)), opinions provided by State agency medical and psychological consultants and other program physicians, psychologists, or other medical specialists based on their review of the evidence in your case record (see § 404.1527(e)(1)(ii));

(vii) At the reconsideration level of the administrative review process, when a State agency disability examiner makes the determination alone (see § 404.1615(c)(3)), findings, other than the ultimate determination about whether or not you are disabled, made by the State agency medical or psychological consultants and other program physicians, psychologists, or other medical specialists at the initial level of the administrative review process, and other opinions they provide based on their review of the evidence in your case record at the initial and reconsideration levels (see § 404.1527(e)(1)(iii)); and

(viii) At the administrative law judge and Appeals Council levels, findings, other than the ultimate determination about whether or not you are disabled, made by State agency medical or psychological consultants and other program physicians or psychologists, or other medical specialists, and opinions expressed by medical experts or psychological experts that we consult

based on their review of the evidence in your case record (see §§ 404.1527(e)(2)-(3)).

(2) Exceptions. Notwithstanding paragraph (b)(1) of this section, evidence does not include:

(i) Oral or written communications between you and your representative that are subject to the attorney-client privilege, unless you voluntarily disclose the communication to us; or

(ii) Your representative's analysis of your claim, unless he or she voluntarily discloses it to us. Your representative's "analysis of your claim," means information that is subject to the attorney work product doctrine, but it does not include medical evidence, medical source opinions, or any other factual matter that we may consider in determining whether or not you are entitled to benefits (see paragraph (b)(2)(iv) of this section).

(iii) The provisions of paragraph (b)(2)(i) apply to communications between you and your non-attorney representative only if the communications would be subject to the attorney-client privilege, if your non-attorney representative were an attorney. The provisions of paragraph (b)(2)(ii) apply to the analysis of your claim by your non-attorney representative only if the analysis of your claim would be subject to the attorney work product doctrine, if your non-attorney representative were an attorney.

(iv) The attorney-client privilege generally protects confidential communications between an attorney and his or her client that are related to providing or obtaining legal advice. The attorney work product doctrine generally protects an attorney's analysis, theories, mental impressions, and notes. In the context of your disability claim, neither the attorney-client privilege nor the attorney work product doctrine allows you to withhold factual information, medical source opinions, or other medical evidence that we may consider in determining whether or not you are entitled to benefits. For example, if you tell your representative about the medical

sources you have seen, your representative cannot refuse to disclose the identity of those medical sources to us based on the attorney-client privilege. As another example, if your representative asks a medical source to complete an opinion form related to your impairment(s), symptoms, or limitations, your representative cannot withhold the completed opinion form from us based on the attorney work product doctrine. The attorney work product doctrine would not protect the source's opinions on the completed form, regardless of whether or not your representative used the form in his or her analysis of your claim or made handwritten notes on the face of the report.

(c) Your responsibility. You must inform us about or submit all evidence known to you that relates to whether or not you are blind or disabled. When you submit evidence received from another source, you must submit that evidence in its entirety, unless you previously submitted the same evidence to us or we instruct you otherwise. If we ask you, you must inform us about:

- (1) Your medical source(s);
- (2) Your age;
- (3) Your education and training;
- (4) Your work experience;
- (5) Your daily activities both before and after the date you say that you became disabled;
- (6) Your efforts to work; and
- (7) Any other factors showing how your impairment(s) affects your ability to work. In §§

404.1560 through 404.1569a, we discuss in more detail the evidence we need when we consider vocational factors.

\* \* \* \* \*

Subpart R—[Amended]

6. The authority citation for subpart R of part 404 continues to read as follows:

Authority: Secs. 205(a), 206, 702(a)(5), and 1127 of the Social Security Act (42 U.S.C. 405(a), 406, 902(a)(5), and 1320a-6).

7. In § 404.1740, revise paragraphs (b)(1) and (b)(2)(i) through (vi) and add paragraph (b)(2)(vii) to read as follows:

§ 404.1740 Rules of conduct and standards of responsibility for representatives.

\* \* \* \* \*

(b) \* \* \*

(1) Act with reasonable promptness to help obtain the information or evidence that the claimant must submit under our regulations, and forward the information or evidence to us for consideration as soon as practicable.

(2) \* \* \*

(i) The claimant's medical source(s);

(ii) The claimant's age;

(iii) The claimant's education and training;

(iv) The claimant's work experience;

(v) The claimant's daily activities both before and after the date the claimant alleges that

he or she became disabled;

(vi) The claimant's efforts to work; and

(vii) Any other factors showing how the claimant's impairment(s) affects his or her ability to work. In §§ 404.1560 through 404.1569a, we discuss in more detail the evidence we need when we consider vocational factors;

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#### PART 405—ADMINISTRATIVE REVIEW PROCESS FOR ADJUDICATING INITIAL DISABILITY CLAIMS

8. The authority citation for part 405 continues to read as follows:

Authority: Secs. 201(j), 205(a)–(b), (d)–(h), and (s), 221, 223(a)–(b), 702(a)(5), 1601, 1602, 1631, and 1633 of the Social Security Act (42 U.S.C. 401(j), 405(a)–(b), (d)–(h), and (s), 421, 423(a)–(b), 902(a)(5), 1381, 1381a, 1383, and 1383b).

Subpart A—[Amended]

9. In § 405.1, revise the first sentence of paragraph (c)(2) to read as follows:

#### § 405.1 Introduction.

\* \* \* \* \*

(c) \* \* \*

(2) Evidence considered and right to representation. Subject to §§ 405.331 and 405.430, you must submit evidence and information to us (see §§ 404.1512 and 416.912 of this chapter). \*

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Subpart D—[Amended]

10. In § 405.331, revise the first two sentences of paragraph (a) to read as follows:

§ 405.331 Submitting evidence to an administrative law judge.

(a) When you submit your request for hearing, you should also submit information or evidence as required by §§ 404.1512 or 416.912 of this chapter or any summary of the evidence to the administrative law judge. You must submit any written evidence no later than 5 business days before the date of the scheduled hearing. \* \* \*

\* \* \* \* \*

PART 416— SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND  
DISABLED

Subpart I—[Amended]

11. The authority citation for subpart I of part 416 continues to read as follows:

Authority: Secs. 221(m), 702(a)(5), 1611, 1614, 1619, 1631(a), (c), (d)(1), and (p), and 1633 of the Social Security Act (42 U.S.C. 421(m), 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c), (d)(1), and (p), and 1383b); secs. 4(c) and 5, 6(c)-(e), 14(a), and 15, Pub. L. 98-460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, and 1382h note).

12. In § 416.912, revise paragraphs (a) through (c) to read as follows:

§ 416.912 Evidence.

(a) General. In general, you have to prove to us that you are blind or disabled. You must inform us about or submit all evidence known to you that relates to whether or not you are blind or disabled. This duty is ongoing and requires you to disclose any additional related evidence about which you become aware. This duty applies at each level of the administrative review process, including the Appeals Council level if the evidence relates to the period on or before the date of the administrative law judge hearing decision. We will consider only impairment(s) you say you have or about which we receive evidence.

(b) What we mean by “evidence.” Evidence is anything you or anyone else submits to us or that we obtain that relates to your claim.

(1) Evidence includes, but is not limited to:

(i) Objective medical evidence, that is, medical signs and laboratory findings as defined in § 416.928(b) and (c);

(ii) Other evidence from medical sources, such as medical history, opinions, and statements about treatment you have received;

(iii) Statements you or others make about your impairment(s), your restrictions, your daily activities, your efforts to work, or any other statements you make to medical sources during the course of examination or treatment, or to us during interviews, on applications, in letters, and in testimony in our administrative proceedings;

(iv) Information from other sources, as described in § 416.913(d);

(v) Decisions by any governmental or nongovernmental agency about whether or not you are disabled or blind (see § 416.904);

(vi) At the initial level of the administrative review process, when a State agency disability examiner makes the initial determination alone (see § 416.1015(c)(3)), opinions provided by State agency medical and psychological consultants and other program physicians, psychologists, or other medical specialists based on their review of the evidence in your case record (see § 416.927(e)(1)(ii));

(vii) At the reconsideration level of the administrative review process, when a State agency disability examiner makes the determination alone (see § 416.1015(c)(3)), findings, other than the ultimate determination about whether or not you are disabled, made by the State agency medical or psychological consultants and other program physicians, psychologists, or other medical specialists at the initial level of the administrative review process, and other opinions they provide based on their review of the evidence in your case record at the initial and reconsideration levels (see § 416.927(e)(1)(iii)); and

(viii) At the administrative law judge and Appeals Council levels, findings, other than the ultimate determination about whether or not you are disabled, made by State agency medical or psychological consultants and other program physicians or psychologists, or other medical specialists, and opinions expressed by medical experts or psychological experts that we consult based on their review of the evidence in your case record (see §§ 416.927(e)(2)-(3)).

(2) Exceptions. Notwithstanding paragraph (b)(1) of this section, evidence does not include:

(i) Oral or written communications between you and your representative that are subject to the attorney-client privilege, unless you voluntarily disclose the communication to us; or



(ii) Your representative's analysis of your claim, unless he or she voluntarily discloses it to us. Your representative's "analysis of your claim," means information that is subject to the attorney work product doctrine, but it does not include medical evidence, medical source opinions, or any other factual matter that we may consider in determining whether or not you are eligible for benefits (see paragraph (b)(2)(iv) of this section).

(iii) The provisions of paragraph (b)(2)(i) apply to communications between you and your non-attorney representative only if the communications would be subject to the attorney-client privilege, if your non-attorney representative were an attorney. The provisions of paragraph (b)(2)(ii) apply to the analysis of your claim by your non-attorney representative only if the analysis of your claim would be subject to the attorney work product doctrine, if your non-attorney representative were an attorney.

(iv) The attorney-client privilege generally protects confidential communications between an attorney and his or her client that are related to providing or obtaining legal advice. The attorney work product doctrine generally protects an attorney's analysis, theories, mental impressions, and notes. In the context of your disability claim, neither the attorney-client privilege nor the attorney work product doctrine allows you to withhold factual information, medical source opinions, or other medical evidence that we may consider in determining whether or not you are eligible for benefits. For example, if you tell your representative about the medical sources you have seen, your representative cannot refuse to disclose the identity of those medical sources to us based on the attorney-client privilege. As another example, if your representative asks a medical source to complete an opinion form related to your impairment(s), symptoms, or limitations, your representative cannot withhold the completed opinion form from us based on the attorney work product doctrine. The attorney work product doctrine would not

protect the source's opinions on the completed form, regardless of whether or not your representative used the form in his or her analysis of your claim or made handwritten notes on the face of the report.

(c) Your responsibility. You must inform us about or submit all evidence known to you that relates to whether or not you are blind or disabled. When you submit evidence received from another source, you must submit that evidence in its entirety, unless you previously submitted the same evidence to us or we instruct you otherwise. If we ask you, you must inform us about:

- (1) Your medical source(s);
- (2) Your age;
- (3) Your education and training;
- (4) Your work experience;
- (5) Your daily activities both before and after the date you say that you became disabled;
- (6) Your efforts to work; and
- (7) Any other factors showing how your impairment(s) affects your ability to work. In §§

416.960 through 416.969a, we discuss in more detail the evidence we need when we consider vocational factors.

\* \* \* \* \*

Subpart N—[Amended]

13. The authority citation for subpart N of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b); sec. 202, Pub. L. 108-203, 118 Stat. 509 (42 U.S.C. 902 note).

14. Amend § 416.1400 by revising paragraph (b) to read as follows:

§ 416.1400 Introduction

\* \* \* \* \*

(b) Nature of the administrative review process. In making a determination or decision in your case, we conduct the administrative review process in an informal, non-adversarial manner. Subject to the limitations on Appeals Council consideration of additional evidence (see §§ 416.1470(b) and 416.1476(b)), we will consider at each step of the review process any information you present as well as all the information in our records. You may present the information yourself or have someone represent you, including an attorney. If you are dissatisfied with our decision in the review process, but do not take the next step within the stated time period, you will lose your right to further administrative review and your right to judicial review, unless you can show us that there was good cause for your failure to make a timely request for review.

15. Revise § 416.1435 to read as follows:

§ 416.1435 Submitting evidence prior to a hearing before an administrative law judge.

You should submit information or evidence as required by § 416.912 or any summary of the evidence to the administrative law judge with the request for hearing or within 10 days after filing the request, if possible. Each party shall make every effort to ensure that the administrative law judge receives all of the evidence (see § 416.912) or all of the evidence is available at the time and place set for the hearing.

Subpart O—[Amended]

16. The authority citation for subpart O of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1127, and 1631(d) of the Social Security Act (42 U.S.C. 902(a)(5), 1320a-6, and 1383(d)).

17. In § 416.1540, revise paragraphs (b)(1) and (b)(2)(i) through (vi) and add paragraph (b)(2)(vii) to read as follows:

§ 416.1540 Rules of conduct and standards of responsibility for representatives.

\* \* \* \* \*

(b) \* \* \*

(1) Act with reasonable promptness to help obtain the information or evidence that the claimant must submit under our regulations, and forward the information or evidence to us for consideration as soon as practicable.

(2) \* \* \*

(i) The claimant's medical source(s);

(ii) The claimant's age;

(iii) The claimant's education and training;

(iv) The claimant's work experience;

(v) The claimant's daily activities both before and after the date the claimant alleges that he or she became disabled;

(vi) The claimant's efforts to work; and

(vii) Any other factors showing how the claimant's impairment(s) affects his or her ability to work. In §§ 416.960 through 416.969a, we discuss in more detail the evidence we need when we consider vocational factors;

\* \* \* \* \*

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